Acme Die Casting, a Division of Lovejoy Industries, Inc. *and* United Electrical, Radio & Machine Workers of America (UE). Cases 13–CA–27619, 13–CA–27788, 13–CA–27941, 13–CA–28033, and 13–CA–28118

July 28, 1995

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On December 16, 1992, the National Labor Relations Board issued its Decision and Order in this proceeding finding, inter alia, in agreement with the judge, that the Respondent violated Section 8(a)(5), (3), and (1) of the National Labor Relations Act by withholding across-the-board wage increases from employees in 1988.[1] The conclusion that the withholding of the wage increases violated Section 8(a)(5) was, in essence, predicated on the finding that across-the-board wage increases had become an established practice and therefore a term and condition of employment not subject to unilateral change without a fulfillment of the bargaining obligation.

Thereafter, the Respondent filed a petition for review of the Board's Decision and Order with the United States Court of Appeals for the District of Columbia. On June 17, 1994, the court issued a decision which, inter alia, affirmed the Board's finding that the Respondent had withheld the wage increases in violation of Section 8(a)(3) and (1).[2] Regarding the 8(a)(5) allegation, however, the court stated that:

> The Board has not demonstrated a comprehensible standard for deciding whether a pattern of increases is sufficiently consistent in timing and/or amount to constitute a settled practice, and so must be granted, or whether such a pattern is discretionary, and so must be put on hold or subjected to bargaining. [Supra at 166.]

The court noted that, in another case,[3] it had remanded to the Board the issue of whether the discontinuance of annual merit raises, which are discretionary in amount, is a violation of Section 8(a)(5).[4]

On November 30, 1994, the Board notified the parties that it had accepted the remand from the court of appeals and invited the parties to submit statements of position. Thereafter, all parties filed statements of position.[5]

Having accepted the remand, the Board must observe the court's opinion as the law of the case. On reconsideration in light of the court's opinion and the parties' statements of position, the Board has decided, for the reasons stated below, to reaffirm its finding that the withholding of wage increases violated Section 8(a)(5).

Discussion

On October 16, 1987, an election was held in a bargaining unit of Acme's production and maintenance workers, resulting in the United Electrical, Radio & Machine Workers of America being selected as the unit's exclusive bargaining representative. Acme filed objections to the election, which objections were overruled. Acme then refused to bargain and on August 31, 1988, the Board found that Acme's refusal to bargain was a violation of Section 8(a)(5).[6] That decision was enforced by the Seventh Circuit on June 14, 1990.[7] While the above proceedings were pending, the events at issue in the present case occurred.

Prior to the election, Acme had granted wage increases to employees on the following dates:

January 4, 1980	October 17, 1983
June 2, 1980	April 30, 1984
January 5, 1981	November 5, 1984
June 1, 1981	May 12, 1985
November 9, 1981	December 2, 1985
January 4, 1982	June 30, 1986
September 13, 1982	February 16, 1987
March 21, 1983	September 28, 1987

The next wage increase was granted on January 2, 1989. All these increases were across-the-board, with every employee's salary raised by the same amount, with one exception: the September 1987 raise.[8] The amount of the across-the-board raises had varied from increase to increase, but all had fallen within a range between approximately 15 cents per hour and 30 cents per hour, with most falling at 20–25 cents per hour.

In sum, over a period of more than 7-1/2 years, the Respondent had given across-the-board increases to its

[1] 309 NLRB 1085 (1992).

[2] *Acme Die Casting v. NLRB*, 26 F.3d 162 (D.C. Cir. 1994).

[3] *Daily News of Los Angeles v. NLRB*, 979 F.2d 1571 (D.C. Cir. 1992).

[4] At the time the court issued its opinion in this case, the Board's decision, on remand, in *Daily News of Los Angeles*, supra, had not issued. Subsequently, on December 30, 1994, the Board issued that decision, at 315 NLRB 1236.

[5] In its statement of position, filed January 17, 1995, the Respondent requested that, if the Board's decision in *Daily News* implicated any of the issues in this case, it be allowed to supplement its statement of position. The Respondents request is denied. The Respondent's statement of position was filed 18 days after *Daily News*, supra, issued. In any event, the record and statements of position of the parties adequately present the issues and the positions of the parties.

[6] *Lovejoy Industries*, 290 NLRB No. 127 (not reported in Board volumes).

[7] *NLRB v. Lovejoy Industries*, 904 F.2d 397.

[8] The Respondent attempted to equalize salaries among employees with this raise. Every employee received some raise in September 1987, but the amounts varied.

employees at relatively regular intervals. The intervals between wage increases varied somewhat but were not random. Except for one interval of 2 months and another interval of 8 months, the 15 intervals between wage increases over the 7-1/2 years varied between 5 and 7-1/2 months. Further, the intervals between the nine wage increases in the 5 years from September 1982 through September 1987 all ranged from between 6 and 7-1/2 months. As the Respondent, for a significant period of time, had given wage increases with relative consistency at regular intervals (i.e., intervals of approximately every 6 months), its pattern of granting wage increases had become an established practice and thus a term and condition of employment for the bargaining unit employees. That practice existed as of October 16, 1987, the date of the Union's election victory. Because that election ultimately resulted in a certification, changes after October 16, 1987, were subject to a bargaining obligation.[9] From September 28, 1987, until January 2, 1989 (i.e., a period of about 15 months), there was no increase. In our view, that prolonged period without an increase represented a change from past practice.[10] In view of the foregoing, as with the established practice in *Daily News*, supra, the limited discretionary aspects of the Respondent's practice with respect to timing and amounts were not sufficient to preclude a finding that the across-the-board increases had become a term and condition of employment. In these circumstances, the unilateral refusal to continue the practice was unlawful under Section 8(a)(5).[11]

[9] *Mike O'Connor Chevrolet*, 209 NLRB 701, 704 (1974), enf. denied and remanded on other grounds, sub nom. *NLRB v. Mike O'Connor Chevrolet-Buick-GMC Co.*, 512 F.2d 684 (8th Cir. 1975).

[10] See *Daily News of Los Angeles*, 315 NLRB 1236 (1994).

Conclusion

For the foregoing reasons, we reaffirm the Board's previous finding that the Respondent violated Section 8(a)(5) by failing to give wage increases in 1988, without providing the Union prior notice and an opportunity to bargain. This finding is supported by the facts of this case and the Board's reasoning in its decision, on remand, in *Daily News of Los Angeles*, supra.

ORDER

The National Labor Relations Board reaffirms the Board's original Order reported at 309 NLRB 1085 (1992), and orders that the Respondent, Acme Die Casting, a Division of Lovejoy Industries, Inc., Northbrook, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[11] Because the Respondent did not give notice and an opportunity to bargain to the Union and, therefore, clearly did not bargain to any impasse, the violation is established under either of the views expressed in *Daily News of Los Angeles*, supra.

Member Cohen notes that the Board and court found the failure to give the increases was unlawful under Sec. 8(a)(3). A finding that such conduct also violated Sec. 8(a)(5) would not add materially to the remedy. In addition, Member Cohen notes that the Board's views with respect to the issue of law have been set out subsequent to the remand, in *Daily News*, supra. In these circumstances, Member Cohen finds it unnecessary to pass on the 8(a)(5) allegation.